ADR SUMMER LUNCHEON

Mediating EXXON NY-NJ Oil Spill

Thursday, July 28, 2011

3rd Floor Cafeteria, South Wing
United States District Court, Eastern District of New York
225 Cadman Plaza East, Brooklyn, New York

Gerald P. Lepp
ADR Administrator

Bryan Wolin
Ken Huang
ADR Interns

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TAB 1

Mediating EXXON NY-NJ Oil Spill

EDNY Mediation Luncheon
July 28, 2011
1:30PM - 2:30PM

AGENDA

1:30-1:35 pm Welcome and Introduction

1:35-2:15 pm Presentation of course materials. Instructor Eric R. Max will discuss the challenges posed by environmental mediation and, specifically, his experiences mediating the Exxon NY-NJ Oil Spill case. He will discuss what it was like mediating between so many parties, including governmental agencies. He will discuss the intricacies involved in dealing with such large-scale mediations.

2:15-2:25 pm Question and Answer Session

2:25-2:30 pm Closing. Instructor will address final questions from the participants and deal with any remaining issues.

TAB 2

State of New Jersey
Office of the Public Defender
Office of Dispute Settlement
Richard J. Hughes Justice Complex
25 Market Street 1st Floor North Wing
P O Box 853
Trenton, New Jersey 08625
Tel: (609) 292-1773 Fax: (609) 292-6292

Chris Christie
Governor

Kim Guadagno
Lt. Governor

Yvonne Smith Segars
Public Defender

ERIC R. MAX, ESQ.

Eric Max is Director of the New Jersey State Office of Dispute Settlement and adjunct professor at New York University School of Law where he teaches mediation. The Office of Dispute Settlement is one of the leading mediation offices in the country, mediating over 100 cases each year for the state and federal courts. Mr. Max has personally served as a court-appointed mediator in over 1,000 cases and settled claims in excess of $1 billion. In addition to serving as a mediator, Mr. Max also worked with the courts in designing a statewide foreclosure mediation program which assists hundreds of homeowners in keeping their homes. He is a recipient of the CPR Legal Program's National Award for "Outstanding Practical Achievement in Dispute Resolution" for his mediation of complex public disputes. Mr. Max received a Specialization in Negotiation and Dispute Resolution from the Harvard Law School Program on Negotiation and a J.D. from Boston University School of Law.

TAB 3

Benefits of Utilizing Mediation to Resolve Complex Environmental Litigation
EDNY ADR Luncheon 7/28/11
Presented by Eric Max, Esq,

Topics to be discussed:

Types of environmental disputes: Mediation is effective in resolving both environmental clean-up cases and resulting environmental insurance coverage litigation.

Multi-jurisdictional: Mediation allows for simultaneous settlement discussions to occur involving various lawsuits filed in different jurisdictions without having to wait for the court to determine the appropriate jurisdiction for the dispute to be heard.

Multi-party: Mediation effectively addresses cases involving multiple plaintiffs and defendants. It also allows for parties not in the litigation to participate in settlement discussions.

Intra-party negotiations: Many times negotiations within the plaintiff or defense groups may be more difficult to resolve than those between the plaintiffs and defendants themselves. Mediation allows for these intra-party disputes to be addressed contemporaneously with those occurring across the table.

Issues addressed: Mediation allows the parties to address not only the issues stated in the pleadings but also related disputes that will impact an overall settlement.

Client involvement: Mediation allows for (requires) direct client involvement in settlement discussions. This increases settlement rates between 25-33%.

Confidentiality: Mediation allows for settlement discussions to be kept confidential—in fact, more confidential than in traditional settlement discussions without a mediator.

Efficiency: Mediation allows settlements to occur in days instead of weeks or months instead of years.

Cost: Mediation can easily save millions of dollars in litigation costs in a single case.

Control of outcome: Mediation allows for the parties to control the outcome of the dispute. It allows for creative resolutions that the court can not provide.

Global settlements: Mediation allows for global settlements to occur in multi-party cases, thus enabling the plaintiffs to achieve total resolution and keep litigation costs contained.

Court-ordered mediation: Settlement rates are substantially the same in mediations ordered by the court or requested by the parties.

TAB 4

New York University

Environmental Law Journal

Confidentiality in Environmental Mediation

Eric R. Max

REPRINT

Volume 2 1993 Number 2

CONFIDENTIALITY IN ENVIRONMENTAL MEDIATION

ERIC R. MAX*

INTRODUCTION

Any discussion of the implications of secrecy in environmental ıw must address the major role that alternative dispute resolution ADR) plays in resolving environmental litigation. Specifically, at-ɛntion must be given to the impact of mediation on the confidenti-lity of settlement discussions. Historically, rules relating to the ɔnfidentiality of settlement discussions have attempted to balance ıe competing policy interests of promoting settlements and ensur-ıg public access to the judicial system.[1] However, this tension is ow being heightened by two facts. First, most court-based media-ons receive more confidentiality protection than traditional settle-ıent discussions.[2] Second, the settlement of environmental cases ften impacts individuals or groups who are not involved in the un-erlying litigation.[3]

In recommending that the New Jersey Supreme Court amend ıe Rules of Evidence to extend a confidentiality privilege to media-on, the New Jersey Supreme Court Task Force on Dispute Reso-ıtion stated:

> Success of the mediation process requires strict confidentiality so that the parties participating feel that they may be open and honest among themselves. In order to create a climate of trust, participants must be assured that revelations made during the mediation process will be held in strictest confidence by the mediator. Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.[4]

On the other side of the scale is the fact that environmental litigation often impacts people who are not directly involved in the lawsuit. This impact might take any number of forms, including: (1) health concerns resulting from damage to the environment; (2) financial costs associated with clean-up and monitoring; and (3) lower property values and other indirect effects.[5] When litigation involving matters such as oil spills or Superfund site clean-ups is settled through mediation, there is a concern that these impacted "non-parties" may not have sufficient access to information needed for accountability and decision making.[6]

This Article examines the impact of mediation on confidentiality in environmental litigation. It uses New Jersey's experience as one of the most progressive states utilizing ADR mechanisms on both the state and federal court levels as a basis for discussion. It also discusses a case study involving the mediation of a major East Coast oil spill to highlight a number of practical concerns relating to confidentiality. The analysis concludes by determining if the increased use of mediation in such cases has tipped the scales too heavily in favor of confidentiality.

I

AN OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION

The phrase "alternative dispute resolution" refers to any type of procedure used to resolve disputes other than traditional litigation.[7] The use of ADR by both the courts and private sector has blossomed over the past ten years;[8] where once ADR was viewed as the exception, it has now become the rule. This is exemplified by the state courts in New Jersey, which have incorporated the use of ADR procedures to such an extent that New Jersey courts now re-

* Director, Office of Dispute Settlement, New Jersey Department of the Public dvocate. A.B., 1982, Vassar College; J.D., 1986, Boston University School of aw.

[1] *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, EDIATION, AND OTHER PROCESSES 179 (1992).

[2] *See, e.g.*, NANCY H. RODGERS & CRAIG A. MCEWEN, MEDIATION: LAW, OLICY, PRACTICE 96 (1989).

[3] *See* Karen L. Liepmann, *Confidentiality in Environmental Mediation: Should hird Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93 (1987); awrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 T. L. REV. 1 (1981).

[4] NEW JERSEY STATE SUPREME COURT TASK FORCE ON DISPUTE RESOLUTION, FINAL REPORT 23 (1990).

[5] *See, e.g.*, Liepmann, *supra* note 3, at 112.

[6] *See* Liepmann, *supra* note 3, at 107.

[7] CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES § 1.002 (William A. Hancock ed., 1989) [hereinafter CORPORATE COUNSEL'S GUIDE]; GOLDBERG ET AL., *supra* note 1, at 3-5.

[8] *See* CORPORATE COUNSEL'S GUIDE, *supra* note 7, §§ 1.001-1.002; Eric Max, *Bench Manual for Appointment of a Mediator*, 136 F.R.D. 499, 502-03 (D.N.J. 1990).

fer to ADR as "complementary dispute resolution"[9]—a complement, as opposed to an alternative, to traditional litigation. ADR procedures include: mediation, arbitration, early neutral evaluation, private judging, as well as more exotic processes such as the mini-trial and summary jury trial.[10] Despite the wide array of ADR procedures available, all third-party ADR mechanisms are based on one of two models: mediation or arbitration.[11]

Although mediation and arbitration are both designed to resolve disputes, their approaches vary dramatically. The mediation model consists of a neutral third party who holds informal settlement discussions in an effort to produce a negotiated settlement.[12] A mediator will hold meetings, identify issues, promote the exchange of information, defuse emotions, and suggest possible approaches to settlement.[13] However, a mediator will not render a decision nor impose a settlement on the parties.[14] A key characteristic of mediation is the ability of the mediator to meet separately with the parties and conduct shuttle diplomacy.[15] During these private discussions, the mediator will explore the strengths and weaknesses of each party's case as well as discuss settlement options.[16]

In contrast, the arbitration model consists of a neutral third party who is formally presented with evidence and then renders a decision.[17] The goal of the arbitrator is not to attempt to produce a negotiated settlement, but rather to render a judgment on the merits of the case.[18] Traditionally, arbitration has been viewed as a creature of contract; parties must consent, through contractual language or otherwise, to participate in the process.[19] Once consent is given, the parties are bound by the decision of the arbitrator.[20]

[9] N.J. CT. R. 1:40.

[10] *See* GOLDBERG ET AL., *supra* note 1, at 3-5. *See generally* CORPORATE COUNSEL'S GUIDE, *supra* note 7, ch. 1.

[11] *See* GOLDBERG ET AL., *supra* note 1, at 6-7. A third type of dispute resolution not dependent on third parties is negotiation, a process which is controlled by the parties themselves. *Id.* at 3. *See also* CENTER FOR PUB. RESOURCES LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 9 (1987).

[12] *See* RODGERS & MCEWEN, *supra* note 2, at 7-10; Max, *supra* note 8, at 503.

[13] *See* RODGERS & MCEWEN, *supra* note 2, at 7-10.

[14] *See* RODGERS & MCEWEN, *supra* note 2, at 7-10.

[15] *See* RODGERS & MCEWEN, *supra* note 2, at 7-10.

[16] *See* RODGERS & MCEWEN, *supra* note 2, at 7-10.

[17] *See* RODGERS & MCEWEN, *supra* note 2, at 10-12.

[18] *See* RODGERS & MCEWEN, *supra* note 2, at 10-12.

[19] *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 199.

[20] *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 199.

However, the courts have recently begun utilizing their own brand of arbitration.[21] These "court-annexed" arbitration programs turn the arbitration process on its head; the court requires litigants to participate in arbitration, but any party may reject the arbitrator's decision and request a trial de novo.[22]

II

CONFIDENTIALITY PROTECTIONS IN ENVIRONMENTAL MEDIATION

Mediation has become the favored procedure in resolving complex environmental matters that find their way to the courts.[23] Complex environmental litigation involving matters such as oil spills and Superfund site clean-ups is extraordinarily expensive and time consuming.[24] It may involve litigation in a number of judicial forums and "gymnasium-sized" trials.[25] Such litigation strains the court's resources and may produce transaction costs for the parties which actually exceed the amount in controversy.[26] Mediation has been found not only to be faster and less expensive than traditional litigation in these cases, but it also has been found to produce creative settlements which go beyond the scope of court decisions.[27]

The value of mediation has not gone unnoticed by the courts. In fact, many courts now require parties to participate in mediation prior to having their case tried. For example, in New Jersey the federal district court has instituted a mandatory mediation program for complex civil cases.[28] Similarly, New Jersey state courts have adopted an extensive ADR program,[29] as well as a new court rule which allows any "court [to] require the parties to attend a mediation session at any time following the filing of a complaint."[30] In

[21] *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 250.

[22] *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 250.

[23] *Cf.* J. Walter Blackburn, *Environmental Mediation as an Alternative to Litigation: The Emerging Practice and Limitations*, *in* ADR IN PUBLIC SECTOR, 123 (Miriam K. Mills ed., 1991).

[24] *See* Jerome B. Simandle, *Resolving Multi-Party Hazardous Waste Litigation*, 2 VILL. ENVTL. L.J. 111, 113 (1991).

[25] *Id.*

[26] *Id.*

[27] *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION 220 (1984).

[28] *See* N.J. FED. CT. R. 49.

[29] *See* NEW JERSEY SUPREME COURT COMM. ON COMPLEMENTARY DISPUTE RESOLUTION, MASTER PLAN FOR VICINAGE COMPREHENSIVE JUSTICE PROGRAMS (1991).

[30] N.J. CT. R. 1:40-4(a).

light of these developments, the mediation process is gaining attention in New Jersey. One aspect of mediation that is receiving particular scrutiny is confidentiality.[31]

Parties entering into a mediation may be concerned about a number of different types of possible disclosure, including: (1) discussions taking place during the mediation or written material produced in the process being used at trial if the case does not settle; (2) the judge who tries the case learning of the content of the mediation discussions; (3) parties outside the mediation gaining access to its contents; and (4) the contents of any settlement produced in the mediation being disclosed.[32]

There is no definitive solution to these problems. Although mediation has historically been defined as a confidential process, it is a fluid term.[33] The degree of confidentiality protection that a particular mediation receives is contingent on a number of factors, including where it takes place, who conducts the procedure, and the subject matter which is being discussed.[34] To analyze the amount of confidentiality protection that a specific mediation will receive, one must look at four possible sources of protection: (1) state and federal rules of evidence, (2) confidentiality agreements between the parties and mediation orders, (3) rules relating to court mediation programs, and (4) state confidentiality statutes.

A. *State and Federal Rules of Evidence*

At a minimum, mediations involving court cases receive the same amount of confidentiality protection as do traditional settlement discussions without a mediator. This protection is stated in Federal Rule of Evidence 408 and its state equivalents.[35] Rule 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.[36]

Although Federal Rule of Evidence 408 provides settlement discussions and mediations with some degree of confidentiality protection, it leaves large areas unprotected. Rule 408 states that settlement negotiations regarding a disputed legal claim are not admissible at trial to prove either the claim or the amount.[37] However, the rule does not address the discoverability of such negotiations. Thus, a mediation may be vulnerable to a discovery request even if the information obtained could not be used at trial. In addition, Rule 408 only protects settlement discussions used for the purpose of proving the claim or its amount.[38] The rule specifically states that it does not apply when the evidence is offered for another purpose such as proving bias of a witness or negating a contention of undue delay.[39] Similarly, Rule 408 appears to allow the use of information obtained in a mediation as evidence that a party was negotiating in bad faith.[40]

In addition, Federal Rule of Evidence 408 addresses only those issues that are in dispute.[41] Thus, while the settlement amount may be protected, the payment schedule may not. Finally, it should be noted that Rule 408 is designed to protect communications as opposed to people. Consequently, a mediator working with only the protection provided by state and federal rules of evidence is vulnerable to being subpoenaed to testify regarding the substance of the mediation.[42]

B. *Confidentiality Agreements*

The second possible source of confidentiality protection may come from an agreement between the parties not to reveal certain information disclosed in the mediation. This agreement usually takes the form of a mediation order signed by a judge.[43] The New Jersey Office of Dispute Settlement, a state mediation office, uses the following language in its model order:

> The mediator may discuss with the Court the status of the mediation process and any failure of a party to participate in good

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31 *See* Symposium, *Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 1-55 (1988).

32 *See Confidentiality in Court-ADR Programs,* ALTERNATIVES TO THE HIGH COST OF LITIG., Nov. 1992, at 173 (1992); Liepmann, *supra* note 3, at 105-09.

33 *See Critical Issues in Alternative Dispute Resolution*, *supra* note 31, at 1.

34 *See generally* GOLDBERG ET AL., *supra* note 1, at 179-98.

35 *See, e.g.*, FED. R. EVID. 408; N.J. R. EVID. 52-53.

36 FED. R. EVID. 408.

37 *Id.*

38 *Id.*

39 *Id.*

40 *See Confidentiality in Court-ADR Programs*, *supra* note 32, at 173-74.

41 FED. R. EVID. 408.

42 *See Confidentiality in Court-ADR Programs*, *supra* note 32, at 174.

43 *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 180-81.

faith and with a sense of urgency, but the mediator shall not, without the prior consent of all parties, disclose to the Court the substance of any matters which are disclosed to him by any of the parties.

All information presented to the mediator shall be deemed confidential and shall be disclosed by the mediator only on consent of counsel, except as necessary to advise the Court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation sessions shall be disclosed in any subsequent proceeding or construed as an admission against interest.[44]

This language covers many of the areas left exposed by Federal Rule of Evidence 408. Under the model order, the mediation is protected from disclosure for the purposes of discovery as well as admissibility. Information cannot be obtained for purposes of a trial or any subsequent proceeding. The order also specifically addresses the role of the mediator in the process by protecting him from being subpoenaed. Finally, it allows the mediator to communicate with the court, but only regarding procedural issues.

Although the language discussed above certainly improves upon the confidentiality protection provided by Federal Rule of Evidence 408, it may not completely protect the mediation process from disclosure. For example, a confidentiality agreement between the litigants may not prevent an outside party from obtaining access to information disclosed in the mediation. Having the agreement signed by a judge in the form of a court order will assist in addressing this concern, especially if the subsequent request is made in the same jurisdiction.

C. *Rules Relating to Court Mediation Programs*

The third source of confidentiality protection can be found in the rules relating to court-annexed mediation programs. A number of state and federal courts now have such programs.[45] The New Jersey Federal Court Mediation Program rules state:

> All information presented to the mediator shall, on request, be deemed confidential and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission.[46]

Similar in scope to the model mediation order, the court rule provides added protection against attempts by outside parties to gain access to information revealed in the mediation. Even more significant than the confidentiality provision itself is the fact that the federal district court of New Jersey has deemed its mediators to be quasi-judicial officers of the court.[47] This not only strengthens the mediators' position as it relates to disclosure, but supports the finding that mediators have immunity from liability relating to the mediation.[48]

D. *State Confidentiality Statutes*

The last potential source of confidentiality protection is state confidentiality statutes. A large number of states have now passed legislation which provides for a mediation privilege.[49] These statutes generally bar admissibility of evidence for any purpose as well as prohibit discovery of the mediation process.[50] They also provide specific protection for the mediator.[51] However, these statutes do differ in a number of important ways. Some statutes only protect mediators who are part of a court program or who have a certain amount of training.[52] Also, a number of statutes provide an absolute mediation privilege with no exceptions while others allow the parties or mediator to waive the privilege.[53]

III.

CASE EXAMPLE: UNITED STATES V. EXXON

Mediation and its impact on confidentiality are best under-

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[44] New Jersey Dep't of the Pub. Advocate, Office of Dispute Settlement, Model Order (1993) (on file with author).

[45] *See, e.g.*, S.D. FLA. FED. CT. R. 16.2; N.J. FED. CT. R. 49; N.D. OHIO FED. CT. R. 7:3.8; W.D. OKLA. FED. CT. R. 46.

[46] N.J. FED. CT. R. 49(E)(4).

[47] N.J. FED. CT. R. 49(A)(3).

[48] *See, e.g.*, Wagshal v. Foster, No. CIV.A.92-2072, 1993 WL 86499, at *2 (D.D.C. Feb. 5, 1993).

[49] *See, e.g.*, FLA. STAT. ch. 44.102 (1983); IND. CODE ANN. §§ 34-4-1-1 to 34-4-1-26 (Burns 1986); IOWA CODE ANN. §§ 679.2 to 679.14 (West 1987); NEB. REV. STAT. §§ 25-2901 to 29-2920 (Supp. 1992); OR. REV. STAT. §§ 36.100 to 36.210 (1991).

[50] *See, e.g.*, NEB. REV. STAT. § 25-2914; OR. REV. STAT. § 36.205(2).

[51] *See, e.g.*, IOWA CODE ANN. § 679.13; NEB. REV. STAT. § 25-2915; OR. REV. STAT. § 36.210.

[52] *See, e.g.*, IOWA CODE ANN. § 679.8; NEB. REV. STAT. § 25-2913(1).

[53] *See* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 15, 29 (1986).

stood by examining its role in an actual case. *United States v. Exxon Corp.*[54] illustrates how the mediation process works and highlights a number of practical issues relating to confidentiality.[55]

On the evening of January 1, 1990, over 500,000 gallons of oil spilled from an Exxon underground pipeline into the Arthur Kill, a waterway separating the states of New York and New Jersey.[56] The record East Coast spill, the second largest in the country to occur that year after the Exxon Valdez in Alaska,[57] damaged the shorelines of both states as well as wildlife living in the waterway.[58]

As a result of the spill, five governments commenced, or threatened to commence, litigation against Exxon for civil damages. Both the State of New Jersey and City of Elizabeth filed suit in New Jersey state court. New York City sued Exxon in New York state court. In addition, both the federal government and State of New York were poised to file actions against Exxon in federal and state court, respectively. The governments alleged that Exxon was not only responsible for the spill, but that its employees ignored three separate warnings from the pipeline's leak detection system and continued to pump oil into the pipeline hours after the leak was detected. Exxon, on the other hand, claimed that a foreign object ruptured the pipeline and denied responsibility for the spill.[59]

The parties and courts faced expensive, protracted litigation with an uncertain outcome. Five governments, bringing actions in three separate jurisdictions, would inevitably produce piecemeal litigation. Such an approach would be expensive and repetitive, and would fail to produce a final resolution of the matter. In addition, although the Exxon spill was by far the largest to occur in the Arthur Kill, it was only one of many spills which took place in the waterway that year.[60] As a result, the governments needed to not only identify Exxon's oil, but also distinguish damage this spill caused from damage caused by other spills. If the governments successfully did this, Exxon faced huge potential damages.

[54] CV-91-1003 (E.D.N.Y. 1991).

[55] The author served as court-appointed mediator in this case. Portions of the following discussion are based on the author's recollection.

[56] Dennis Hevesi, *Exxon Pipeline Spills Oil into the Arthur Kill*, N.Y. TIMES, Jan. 3, 1990, at B2.

[57] Dennis Hevesi, *Coast Guard Says Spill off S.I. Exceeds 200,000 Gallons*, N.Y. TIMES, Jan. 4, 1990, at B1, B5.

[58] Dennis Hevesi, *Official Warns S.I. Oil Leak Threatens Crucial Bird Area*, N.Y. TIMES, Jan. 5, 1990, at B3.

[59] Hevesi, *supra* note 57, at B1.

[60] Hevesi, *supra* note 56, at B2.

In addition, even if the governments prevailed after years of litigation, it was unlikely that any money recovered from Exxon would go toward addressing the damage done to the waterway. Rather, this money probably would go to the governments' general coffers. This last issue concerned Exxon as well as the governments. In light of this concern and other oil spills occurring across the country, all parties wanted the money to make a positive impact on the environment.

With the above concerns in mind, Judge Edward W. Beglin, Jr., who was handling the New Jersey state court litigation involving Exxon, the State of New Jersey, and the City of Elizabeth, directed these three parties to a state mediator to explore the possibility of using mediation to resolve their claims.[61] At the same time, similar discussions were also taking place in New York state court between Exxon and the City of New York.[62] However, one of the major hurdles which the parties needed to overcome before they would consent to mediation was the amount of confidentiality protection which would apply to the process.

A. *Confidentiality Issues*

Issues relating to confidentiality included: (1) how to treat the mountains of scientific data which the parties were compiling in preparation for trial; (2) the governments' ability to disclose information obtained in the mediation internally as well as share it with each other; and (3) the possibility that by intentionally disclosing information in the mediation, a party might then claim that this material could not be used at trial, thus having the effect of forcing the other side to prove that an independent source for the evidence existed. Another concern that arose in the mediation was that outside parties might seek discovery against one governmental entity without another government entity's knowledge. Because there were no relevant court rules or mediation statutes in effect at the time, the parties agreed to try to negotiate a resolution of these issues as part of the mediation.

After months of discussions with the mediator, the parties agreed on confidentiality language to insert into the mediation order in New Jersey. The one and a half page section provided as follows:

All oral and written communications made during the mediation

[61] N.J. v. Exxon Corp., No. UNN-L-0387-90 (N.J. Super. Ct. Law Div. Oct. 10, 1990).

[62] City of N.Y. v. Exxon Corp., No. 0398/90 (N.Y. Sup. Ct. Sept. 18, 1990).

> which are subject to the above confidentiality provisions are not admissible into evidence in any judicial or administrative proceeding. However, evidence shall not be excluded or otherwise considered improper . . . on the grounds that it was developed as an outgrowth of information supplied in mediation. Further, written formal expert reports . . . may be admissible into evidence. Disclosure of information will not result in the waiver of any privilege or right of confidentiality . . . . If anyone seeks disclosure of information disclosed in this mediation . . . immediate notice will be provided to . . . the mediator and other parties in the mediation.[63]

This language reflects the fact that the parties were very concerned that the confidential nature of mediation would serve as a vehicle to hide, rather than disclose, information. As a result, the mediation was conducted with a mixture of confidentiality protection and disclaimers. Adding to this unique situation was the fact that the parties in New York and New Jersey had slightly different confidentiality orders in place at different times. Also, the federal government and New York State participated in the mediation without ever filing a complaint or signing a mediation order.

B. *Settlement*

Through a single mediation process involving all of the parties, the five governments achieved a global settlement of all civil claims against Exxon in six months and the parties filed a consent order in federal court in the Eastern District of New York.[64] The court-approved settlement included the following provisions: (1) Exxon must pay the governments $10 million over five years for the replacement or restoration of lands damaged by the spill; (2) Exxon must train government designees on its oil transfer operations and the cleaning of birds exposed to oil spills; and (3) all parties must exchange scientific data and make this information generally available to promote scientific study of the environment in and around the Arthur Kill.[65]

The mediated settlement reflected a number of substantive and procedural innovations. Substantively, it was designed to specifically address the harm done to the environment. It also addressed the future by providing for training to improve the response to subsequent spills. Finally, it provided for the release of all parties' scientific data to promote the study of the environment. None of these results would have been possible if the case had been fully litigated. Procedurally, the use of mediation was innovative because it provided the parties with a quasi-judicial forum in which to conduct settlement discussions. As a result, a global settlement was achieved in less time than it would have taken to simply unravel the jurisdictional issues involved. In fact, the issue of which court had jurisdiction over the settlement was resolved as part of the mediation.

[63] N.J. v. Exxon Corp., No. UNN-L-0387-90 (N.J. Super. Ct. Law Div. Oct. 10, 1990).

[64] United States v. Exxon Corp., CV-91-1003 (E.D.N.Y. 1991).

[65] *Id.*

C. *Lessons on Confidentiality*

How confidentiality was handled in this case teaches a number of lessons. First, although in reality there may not have been much more confidentiality protection in this case than that provided by Federal Rule of Evidence 408, the parties' perception that the proceedings were indeed private was essential for the mediation to be successful. Second, confidentiality would have been better addressed by court rule or statute than by the parties themselves. The reason for this is not only that a court rule or statute would have protected the confidentiality of discussions more effectively, but that it would also have removed a volatile issue from the negotiations. In the Exxon case, it took as long to negotiate the mediation order as it did to negotiate the actual settlement. In addition, a well-defined and published confidentiality rule or statute will decrease the likelihood that outside parties will challenge the confidentiality of the proceedings.

Third, the Exxon case also raises an interesting point regarding the role of the mediator and his responsibility to parties outside of the process. In its memorandum of law to the court supporting the settlement, the governments argued that the use of mediation was itself evidence that the settlement was fair because a resolution "was achieved after months of arms length negotiation, under the supervision of a court-appointed mediator."[66] This language suggests that a mediator may have some responsibility for the fairness of a settlement. If this is the case, one may ask whether this responsibility flows to parties outside of the mediation. Specifically, does a mediator have a responsibility to disclose certain information to outside parties?

[66] Plaintiff's Memorandum of Law in Support of Motion for Entry of Judgment on Consent at 9, CV-91-1003 (E.D.N.Y. 1991).

The initial answer to this question is that a mediator is responsible for the process and not the result. A mediator can set the agenda for discussions and propose approaches to settlement, but cannot impose a settlement on the parties.[67] To place responsibility for the substance of a settlement on the mediator is contrary to his role and powers. However, a mediator is a participant in the proceedings and there may be instances where an obligation exists on the part of the mediator to disclose otherwise confidential information.

Factors that may impact on a mediator's obligation to disclose information include the identity of the mediator and the site of the mediation. For example, a state or federal mediator may have a greater obligation to disclose information in the public interest than a mediator serving in a purely private capacity. Similarly, a court-appointed mediator may have a higher standard due to the fact that he is an officer of the court or a quasi-judicial officer. The nature of the information may also affect the analysis. Where imminent physical harm will result, the mediator may have an affirmative obligation to disclose information. As New Jersey Court Rule 1:40-4 states: "A mediator has the duty to disclose to a proper authority information obtained at a mediation session on the reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm."[68]

CONCLUSION

The increased use of court-based mediation has enhanced the amount of confidentiality protection afforded settlement discussions in many environmental cases. While this fact may cause some initial concern, it must be viewed in light of the mediation process itself. Because mediation promotes the exchange of information and allows parties to view the dispute in broader terms than in traditional litigation, it offers some unique advantages to the parties impacted by, but outside of, the mediation. As the Exxon case illustrates, these advantages include: (1) allowing parties outside of the litigation to directly participate in settlement discussions; (2) increasing the likelihood of disclosure of information and scientific data produced in the mediation; and (3) increasing the likelihood

[67] *See, e.g.*, GOLDBERG ET AL., *supra* note 1, at 103.
[68] N.J. CT. R. 1:40-4.

that settlements represent the interests of parties outside of the lit
gation. These advantages are partly due to the participation of
neutral third party in the settlement process who not only ensur
procedural fairness, but who may also have an affirmative oblig
tion to disclose certain information to parties outside of the medi
tion. As a result, although mediation does not relieve the tensio
which exists between the two competing policy interests of promo
ing settlements and providing access to the judicial system, it do
allow them to co-exist.

TAB 5

In the Shadow of Valdez, Exxon and 5 Gov'ts Mediate a $10M Settlement to NY-NJ Oil Spill

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Though the $1 billion settlement in the Exxon Valdez oil spill in Alaska garnered more headlines, a more modest $10 million pact reached by Exxon and five governments over an East Coast pipeline spill teaches an important, precedent-setting lesson about the enormous value of mediation in complex environmental disputes.

The $10 million settlement brought an end to the civil disputes over the January 1990 rupture of an Exxon underwater oil pipeline that gushed 567,000 gallons of heating oil into the Arthur Kill, a body of water near New York City. The settlement, reached after a scant five months of mediation, was announced on March 20, ten days after the Valdez accord.

Messy Case

The Arthur Kill mishap damaged beaches and fish and other natural resources; posed difficult questions of damage apportionment among the five involved governments; and raised a tangle of jurisdictional issues. The settlement itself broke new ground, featuring such provisions as land purchases for the benefit of the environment; an Exxon commitment to train government workers in cleanup techniques; and a data-sharing agreement among the parties.

To learn more about the complex case and its creative resolution, *Alternatives* turned to Eric R. Max, the man who mediated the matter. Mr. Max, the chief mediator in the New Jersey Department of the Public Advocate's Office of Dispute Settlement, is an experienced ADR neutral whose successful mediation of a 1989 housing controversy in Newark, N.J. in 1989 earned him a CPR Legal Program ADR award. (*Alternatives*, March 1990 at p. 39; November 1989 at p. 189.)

The mediation effort was kindled about a year ago, when New Jersey Superior Court Judge Edward W. Beglin Jr. heard Mr. Max give a speech about his mediation of the Newark housing case. The judge was sitting on a pair of consolidated suits against Exxon over the Arthur Kill mishap, one filed by the state of New Jersey and one by the city of Elizabeth, N.J.

Some months later, Judge Beglin gave Mr. Max a call and broached the possibility of mediation. Mr. Max was interested, but he also knew that there were other parties involved in the dispute besides those before Judge Beglin. Due to its central location, the Arthur Kill mishap affected lands and waters under the jurisdiction of various cities, states and the federal government.

For example, Mr. Max knew that another Arthur Kill lawsuit, this one filed by New York City, was pending against Exxon in a New York state court. And he knew that two other potential public plaintiffs, the federal government and New York State, were not yet parties to any suit. (There were also some private civil suits over the spill, but they were resolved separately.)

Surveying all this, Mr. Max knew that mediation "would only make sense if I could get all the parties involved," he told *Alternatives*. He arrived at this conclusion for both substantive and strategic reasons.

As to the former, he knew that any settlement must be allocated among the five government/plaintiffs. "The [damaged] fish swim all over," he says. "Does the damage apply to New York or New Jersey?" The case would remain unresolved if these apportionment issues remained unresolved, he believed. Moreover, if only some parties participated in the mediation, dif-

(continued on following page)

Arthur Kill Oil Spill Case Is Mediated in Five Months

(continued from previous page)
ficult jurisdictional and forum questions would arise with courts that were presiding over other pieces of the case.

"If this were done piecemeal, it would have taken forever," sums up Mr. Max.

Plenary Affair

As for his strategic premises, the mediator knew that the parties would be more willing to mediate if it were a plenary affair. "Exxon certainly would not want to settle one suit and then have another one come up later," explains Mr. Max. "And that held true for the governments too. Everyone wanted to solve the dispute as a package deal, to put it all to rest."

With these thoughts in mind, Mr. Max "met with all the governments" to bring them all in to the ADR process. He succeeded fairly quickly. He was named the mediator by court order in the New York case in mid-September and in the New Jersey case in mid-October. That brought Exxon, New York City, New Jersey and Elizabeth, N.J. into the mediating room. And the two non-parties, the federal government and New York State, soon agreed voluntarily to mediate.

"By the end of October," he says, "everyone was on board."

Convening all these parties was, no doubt, a crucial step for the mediation's ultimate success. But in a way the work had just begun.

Once the parties were gathered, Mr. Max embarked on rounds of many meetings. Beginning in late October and continuing through mid-March, "We had maybe twenty meetings of all the parties, plus a good number of individual or partial meetings," he recalls. Many of these gatherings "went well into the night" and featured "intense negotiations."

Given the complexity of issues, the multitude of meetings was no surprise. "The issues were very broad," Mr. Max says. One was cost recovery. Although Exxon spent $18 million on the cleanup, various governments had also spent funds on that task and desired reimbursement. Another issue was property damage—"oil on the beaches and the like," says Mr. Max.

Another issue—perhaps the most difficult—was natural resources damage, including harm to fish, algae growth in the water as a result of the spill, and so on. Not only was it hard to quantify these damages in dollars, but it was also hard to allocate them among the five plaintiffs and potential plaintiffs.

The multiplicity of parties also made many meetings necessary. Unlike a binary dispute, the Arthur Kill case involved not only a resolution between the plaintiff camp and the defense camp, but also *within* the latter. "There were many negotiations with each of the five governments" on the plaintiff side, says Mr. Max. The dynamics within the plaintiff camp also evolved as the case continued, he adds.

> 'If this were done piecemeal, it would have taken forever,' says mediator Eric Max.

How did Mr. Max rein in all these complexities to realize a speedy settlement? He took several tacks.

First, he put on a backburner the intra-plaintiff allocation question. "I intentionally pushed that issue back," he says, suggesting that grappling with the problem before the overall settlement was achieved would balkanize and destroy the mediation effort.

Instead, Mr. Max dealt upfront with the "whole pie" of settlement, a process that took "a lot of work," involved a number of disagreements among the plaintiff governments and, of course, intense negotiations with Exxon.

When the overall settlement structure was built, the allocation issue was put on the table, and its resolution was more or less worked out by the five governments themselves "without much of my intervention," Mr. Max relates.

A second strategy for mediator Max was based on the participants' desire to get the whole dispute over with quickly and completely. This desire applied to all parties. Mr. Max knew Exxon would not want to mediate many partial settlements. Similarly, he knew the five governments desired a speedy resolution if only to minimize their considerable legal expenses. And all sides, Mr. Max knew, would rest easier if the controversial dispute were off the front pages.

At the start of the mediation, he used these varied inclinations to achieve what he knew was the sine qua non of quick settlement: full participation by all parties in the mediation. During the negotiation stage, he found another tool for this same goal: the criminal side of the case.

As the civil-suit mediation progressed, so did negotiations between Exxon and the U.S. Attorney in New Jersey over the criminal aspects of Arthur Kill. There was no intersection between the two sets of talks, but Mr. Max was aware of the criminal analogue and he also knew how close those negotiations were to consensus.

Mr. Max used his knowledge of the progress of the criminal talks to exert "time pressure" on the civil disputants, he told *Alternatives*. He urged the latter to come to quick agreement, so that the criminal and civil sides of the matter could be resolved all at once. The criminal negotiations thus became a spur for the civil negotiators. This strategy appealed to all parties' desire to wrap the case completely up, he believed. And the beauty part, he notes, is that "I turned a negative [the criminal side of the case] into a positive."

On Time

Ultimately, the civil disputants kept time to this outside "clock." Indeed, the March 20 press conference was a joint affair, with the announced

(continued on page 62)

Exxon, Five Gov'ts Mediate $10M Accord in Spill Case

(continued from page 52)
completion of both the civil and criminal negotiations. (As to the latter, Exxon pleaded guilty to a single misdemeanor and paid a $5 million penalty.)

Turning a negative into a positive was the idea behind a third mediation strategy deployed by Mr. Max. "In other spill cases, the traditional resolution involves merely the payment of money by one side to the other," he says. There is no nexus with the environment. If the monies go to a government, for instance, the funds will simply be placed in the general revenue accounts to pay or paper clips or who knows what.

In contrast, Mr. Max urged the parties in this case "to see the settlement as an opportunity to benefit the environment." Such an approach would not only help the environment, but it would also generate enthusiasm among the parties and pay them public-relations dividends.

The approach succeeded. The final settlement features several innovative provisions that tie it closely to the environment. And, Mr. Max stresses, mediation enabled the parties "to come together and talk bluntly," thus providing the fertile soil in which a creative settlement could flower.

"This kind of settlement could never have happened in litigation," he declares.

Pact Terms

Broadly, the settlement calls for Exxon to pay the five government/plaintiffs, in varying proportions, $10 million over the next five years. Unlike a standard settlement, however, these funds are earmarked for specific environmental "good deeds." Among them is the purchase of lands in the Arthur Kill area—parcels both affected and unaffected by the spill—for restoration and environmental protection. Other monies will finance environmental studies of the Arthur Kill.

Under another settlement term, Exxon will train government workers or their designees in such environmental tasks as handling birds exposed to oil spills. Another provision directs Exxon to give the government/plaintiffs information about its 6.7-mile underwater pipeline and its leak-detection system. Under another term, the parties all agree to share all their scientific data about the Arthur Kill spill in order to advance research.

In these and other ways, the Arthur Kill settlement—"achieved in five months instead of five years," says Mr. Max—resolved a case in a way impossible in court. For example, the data-sharing agreement "could never have happened in litigation," asserts Mr. Max. He also speculated that the mediation may "set a precedent for resolving complex environmental disputes," both in the speed of resolution and in the creativity of the settlement terms.

Mr. Max says credit for the fruitful results is due to all the parties involved in the case.

TAB 6

RG 7986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, STATE OF NEW YORK and THOMAS C. JORLING, New York State Commissioner of Environmental Conservation, as New York Trustee of Natural Resources, STATE OF NEW JERSEY and SCOTT WEINER, New Jersey Commissioner of the Department of Environmental Protection, as New Jersey Trustee of Natural Resources, and THE CITY OF NEW YORK,

Plaintiffs,

-against-

EXXON CORPORATION,

Defendant.

----------X

CV-91-1003

91 CV NORMAN, J.

CONSENT ORDER

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WHEREAS, the parties to this Consent Order agree that settlement of the claims in this case against Exxon is in the public interest and that entry of this Consent Order is the most appropriate means to resolve the matters covered herein;

WHEREAS, Exxon Corporation ("Exxon"), through a division, Exxon Company, U.S.A., is the owner and operator of an Inter-Refinery Pipeline ("IRPL") for the transfer of petroleum and petroleum products between the Exxon Bayway Refinery ("Bayway"), located in Linden, New Jersey and the Exxon Bayonne Plant and Terminal ("Bayonne Plant"), located in Bayonne, New Jersey, which pipeline runs in part beneath the Arthur Kill, a body of water separating the State of New Jersey from the State of New York;

WHEREAS, a spill of No. 2 fuel oil ("Spill") occurred from the IRPL on or about January 1-2, 1990;

WHEREAS, No. 2 fuel oil from the Spill entered into the waters of the State of New Jersey and the State of New York and reached the shorelines of both states and property owned by the United States, the States of New York and New Jersey, the City of Elizabeth and the City of New York;

WHEREAS, the United States of America and the Department of Commerce through the National Oceanic and Atmospheric Administration ("NOAA"), and the Department of the Interior, the State of New Jersey and Scott Weiner, Commissioner of the Department of Environmental Protection (hereinafter referred to jointly as the "State of New Jersey"), the State of New York and Thomas C. Jorling, Commissioner of the New York State Department

of Environmental Conservation (hereinafter referred to jointly as the "State of New York") are trustees for, and the City of New York and the City of Elizabeth are owners of, certain natural resources damaged by the Spill;

WHEREAS, the United States of America on behalf of the Department of Commerce through the National Oceanic and Atmospheric Administration, and the Department of the Interior and the Environmental Protection Agency (hereinafter referred to jointly as the "United States") and the State of New York, the City of New York and the State of New Jersey filed a complaint on March 20, 1991, alleging that, by reason of the Spill, Exxon is responsible for the Spill and liable for all cleanup, removal and monitoring costs incurred, all costs of studying both the short-term and long-term effects upon the natural resources, and damages to the natural resources owned, controlled, managed by, held in trust by, appertaining to, or otherwise controlled by the Governments, and all penalties and fines pursuant to the Federal Water Pollution Control Act, the New York Navigation Law, the New York Environmental Conservation Law, the common law of nuisance, and other provisions of statutory and common law;

WHEREAS, the State of New Jersey has instituted a lawsuit entitled State of New Jersey, Department of Environmental Protection v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UNN-L-0387-90, alleging that Exxon is responsible for the Spill and seeking all

cleanup, removal and monitoring costs incurred, all costs of studying both the short and long term effects to the natural resources and environment of the State of New Jersey and all environmental damage costs, including, but not limited to, restoring and/or replacing the State's damaged natural resources and all damages suffered by the citizens of New Jersey for loss of use of these resources;

WHEREAS, the City of Elizabeth has also instituted a lawsuit entitled City of Elizabeth, a Municipal Corporation of the State of New Jersey v. Exxon Corporation, a Corporation of the State of New Jersey, d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UNN-L-0560-90, alleging that Exxon is responsible for the Spill and seeking judgment for damages, indemnification for costs of future economic and environmental treatment and surveillance and keeping open claims which may arise by virtue of future economic and environmental conditions resulting from the Spill, which suit has been consolidated into the action entitled State of New Jersey, Department of Environmental Protection v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A. and City of Elizabeth, a Municipal Corporation of the State of New Jersey v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UNN-L-0387-90;

WHEREAS, pursuant to the Order of Judge Edward W. Beglin, Jr., Superior Court of New Jersey, dated October 10, 1990, a mediator, Eric R. Max, has been appointed to facilitate a settlement of the consolidated action;

WHEREAS, the City of New York has instituted an action in the Supreme Court of the State of New York, Richmond County, entitled The City of New York and Carlos M. Rivera, as Fire Commissioner of the City of New York v. Exxon Corporation, Index No. 0398/90, alleging that Exxon is responsible pursuant to the New York State Navigation Law, the New York City Hazardous Substance Emergency Response Law, the New York City Fire Code and common law theories of fraud, nuisance, negligence and trespass for the Spill and injury caused by it and is seeking cleanup, removal, and monitoring costs, economic, consequential, property and punitive damages, penalties and injunctive relief arising out of the Spill;

WHEREAS, pursuant to the Order dated September 18, 1990 of Justice Louis Sangiorgio, Supreme Court, Richmond County, the same mediator has been appointed to facilitate a settlement of the aforesaid litigation commenced by the City of New York;

WHEREAS, the United States of America, acting through the Department of Justice, the Office of the United States Attorney for the Eastern District of New York, NOAA, the Department of the Interior, and the Environmental Protection Agency, and the State of New York, acting through the office of the State Attorney General and the New York State Department of Environmental

Conservation ("NYSDEC"), have attended and participated in mediation sessions conducted pursuant to the mediation orders;

WHEREAS, it is understood that prior to any reopening of the IRPL, Exxon shall obtain from the City of New York a revocable consent to maintain and use certain tunnels and pipelines in Staten Island, identified in a revocable consent given on or about July 19, 1973 to Exxon Corporation;

WHEREAS, Exxon participated in the Bi-State Oil Industry Working Group and, as a member of the audit subcomittee, among others, has agreed that internal audits as reviewed by outside auditors of individual facilities' petroleum transfer operations, including Bayway's, may occur and the facility specific report which results therefrom should be made available to the Governments through NJDEP and NYSDEC.

WHEREAS, Exxon certifies that on March 2, 1990, Exxon voluntarily suspended its tanker and barge operations at Bayway and the Bayonne Plant pending a comprehensive evaluation of marine operations at those facilities; on March 3, 1990, a team drawn from Exxon's worldwide technical resources, supplemented by outside consultants, began a Marine Operations Study (the "MOS") to develop recommendations which, when implemented, would promote the interests of safety and environmental protection; the scope of the MOS included all marine and related terminaling operations from the beginning of inbound maneuvering of tankers and barges to the conclusion of outbound maneuvering; and based on the MOS recommendations, Exxon has voluntarily undertaken the specific

action steps, among others, which are identified in Exhibit A hereto, an update of which will be furnished to the Governments one year after entry of the Consent Order; and normal marine operations resumed at Bayway and the Bayonne Plant on June 11, 1990;

WHEREAS, Exxon certifies that to date it has incurred total costs of approximately ten million dollars ($10,000,000) in conducting the MOS and implementing its recommendations; and for 1991, Exxon anticipates additional costs in excess of fifteen million dollars ($15,000,000) resulting from implementation of the MOS, including capital expenditures of at least six million dollars ($6,000,000) for continued work on capital projects being undertaken as a result of the MOS recommendations;

WHEREAS, Exxon has complied with the New Jersey Spill Compensation and Control Act directive and paid $661,250.00 to the Governments to conduct a study by the Governments of the effects of the Spill;

WHEREAS, Exxon has undertaken clean-up activities under United States Coast Guard supervision, which activities Exxon certifies cost approximately eighteen million dollars ($18,000,000), and has undertaken and will undertake, through participation with the Governments as set forth in the attached Memorandum of Agreement and this Consent Order, appropriate actions necessary to restore and replace the natural resources which have been damaged as a result of the Spill;

WHEREAS, Exxon intends to enter a plea of guilty to a crime of negligent violation under Section 309(c)(1) of the Federal Water Pollution Control Act, 33 U.S.C. Section 1319(c)(1) in the United States District Court for the District of New Jersey and make payments totalling five million dollars ($5,000,000) as specified in the agreements connected with that action;

NOW THEREFORE, it is hereby ordered, adjudged and decreed, and agreed among the parties:

I. JURISDICTION

The Court has jurisdiction over the subject matter and over the parties to this action pursuant to 28 U.S.C. Sections 1331, 1332, 1345, 1367 and 33 U.S.C. Sections 1319 and 1321. This Court also has jurisdiction over the subject matter of the pendent State law claims in this action. Venue is proper in this Court pursuant to 28 U.S.C. Sections 1391(b) and (c).

II. DEFINITIONS

A. "Natural Resources" shall have the meaning provided in Section 101(16) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(16).

B. "Governments" shall mean the United States, the State of New York, the City of New York, the State of New Jersey, and the City of Elizabeth.

III. PARTIES BOUND

This Consent Order shall apply to and be binding upon and inure to the benefit of the signatories, their present and former officers, directors, trustees, shareholders, agents,

representatives, employees, subsidiaries and affiliates, as well as their heirs, executors, administrators, successors and assigns. Unless otherwise expressly provided elsewhere herein, upon approval and entry of this Consent Order by the Court, the Consent Order shall become effective and constitute a final judgment between and among the Governments and Exxon.

IV. PAYMENT

A. Upon entry of this Consent Order, Exxon shall be obligated to pay the sum of Ten Million Dollars ($10,000,000) as follows:

1. $1,500,000 on entry of this Consent Order; of which no more than two hundred fifty thousand ($250,000) (the precise amount to be verified by an accounting) is to be paid directly to the City of Elizabeth for its response costs and no more than two hundred thousand ($200,000) (the precise amount to be verified by an accounting), is to be paid directly to the City of New York for its response costs;

2. $3,000,000 on the first anniversary of the lodging of this Consent Order; three hundred thousand dollars ($300,000) of which will be paid directly to the City of Elizabeth for improvements to its waterfront park area;

3. $3,000,000 on the second anniversary of the lodging of this Consent Order;

4. $833,333 on the third anniversary of the lodging of this Consent Order;

5. $833,333 on the fourth anniversary of the lodging of this Consent Order; and

6. $833,334 on the fifth anniversary of the lodging of this Consent Order.

B. The above payments, except as otherwise specified above, shall be used by the Governments for (i) the acquisition of fee title of, or conservation easements on, lands or other property interests including tidal and intertidal wetlands within the New York/New Jersey Harbor and related ecosystems including the Arthur Kill in restoration or replacement of natural resources that have been damaged as a result of the Spill; (ii) the restoration (including the establishment, maintenance and provision of public access) and protection of lands including tidal and intertidal wetlands acquired with such payments, and adjacent lands and wetlands, impacted by the Spill, and other lands including tidal and intertidal wetlands in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill; and (iii) performance of studies in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill.

C. Funds to Be Paid to Court Registry

1. Because the Governments' jurisdiction of the injured natural resources is overlapping and the monies recovered are jointly held by the Governments, except as otherwise set forth in Paragraph IV. A, above, no

determination has been made as to the expenditures of monies by any individual government. Accordingly, payments made by Exxon, except as otherwise provided, shall be deposited in the Registry of the Court, United States District Court for the Eastern District of New York.

2. Except as otherwise provided herein in Paragraph IV. A and B, each payment required by this Consent Order shall be made to the Clerk, United States District Court for the Eastern District of New York. Each such payment shall include on its face a statement that it is a payment pursuant to the Consent Order in 91 CV ___. Exxon shall cause copies of each such payment and of any transmittal letter accompanying such payments to be sent to the Governments at the addresses set out in Paragraph XV.

3. The Registry of the Court shall receive and hold payments in interest-bearing instruments or in an interest bearing account or in such other manner as the Court shall order. All funds and all interest accrued thereon in the Registry Account shall be held in the name of the "Clerk, United States District Court" for the benefit of the Governments. Upon application by the Governments, as provided for in the Memorandum of Agreement appended hereto as Exhibit B, monies in the

Registry Account shall be disbursed by further order of this Court.

D. Interest and Penalties for Late Payments

1. If any payment required of Exxon by Paragraph IV of this Consent Order is not made by the specified date, Exxon shall be liable to the Governments for interest on the overdue amount from the time payment was due until full payment is made at the higher of (a) the rate established by the United States Department of the Treasury under 31 U.S.C. section 3717 and 4 C.F.R. section 102.13 or (b) the prime rate plus 4 percent.

2. If any payment is not made by the date specified, Exxon shall also pay to the Registry Account stipulated penalties in the following amounts for each day the payment is late:

DAY(S) OF DELAY	PENALTY
1-5	$1,500 per day
6-30	$3,000 per day
Beyond 31 days	$5,000 per day

3. Interest and penalties under this paragraph shall be in addition to any other remedies or sanctions that may be available to the Governments on account of Exxon's failure to comply with the terms of this Consent Order.

V. REOPENING THE IRPL

A. Should Exxon determine to reopen the IRPL, Exxon shall undertake a study or studies to determine the extent of any work that may be required to reopen the IRPL or to modify procedures or equipment prior to the recommencement of IRPL operations. Within thirty (30) days of completion of any report of such study prepared by or on behalf of Exxon which addresses findings and/or recommendations of said study concerning the IRPL, Exxon shall send a copy of the report by certified mail to each of the Governments at the addresses designated in Paragraph XV hereof.

B. If Exxon decides to reopen the IRPL, it shall provide written notice by certified mail to the Governments not less than 90 days prior to reopening. Said notice shall state the date Exxon plans to reopen the IRPL and shall specify that portion(s) of the IRPL to be reopened.

C. Not later than thirty (30) days prior to any reopening of the IRPL, Exxon shall: (1) provide the Governments with a written description of the IRPL and its location, sizes, service (i.e. product carried), flow rates, and pressure (the "Major Operating Characteristics"), including a description of the leak detection system, operating and maintenance procedures, and measures taken to reduce the risk of future external damage to the IRPL; (2) provide the Governments with a copy of any application for operation of the IRPL which has been or will be submitted to the United States Department of Transportation ("DOT"); (3) provide a reasonable opportunity for a tour of the

IRPL facilities for a total of not more than 25 representatives from the Governments during which operation of the IRPL and leak detection equipment and procedures will be explained; and (4) send to each of the Governments a notice designating the position, location and telephone number of an employee of Exxon to be available to respond to inquiries from the Governments concerning the IRPL. Exxon shall timely notify the Governments of any change in the position, location or telephone number of said designated employee.

D. Exxon will inform the Governments in writing of any significant change in the Major Operating Characteristics within thirty (30) days of the institution of such change.

E. It is understood that any reopening of the IRPL shall be subject to such regulation by DOT as may be provided for by the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. §§ 2001-2014, or regulations promulgated pursuant thereto. However, neither this Consent Order nor any proceeding taken hereunder shall be construed as or deemed to be evidence or an admission or concession by Exxon of any jurisdiction of any of the Governments over the IRPL or of any authority of any of the Governments to restrict, regulate or authorize use of the IRPL, which is expressly denied by Exxon. None of the provisions of this Consent Order, nor evidence of any negotiations or proceedings in furtherance of the compromise and settlement herein, shall be offered or received in any action or proceeding as an admission or concession that any of the Governments has or

lacks any jurisdiction over, or any authority to restrict, regulate or authorize use of, the IRPL.

F. Until such time as DOT issues an order governing the operation of the IRPL, Exxon agrees that, prior to the reopening of the IRPL, it will (1) develop a new written IRPL operation and maintenance manual, which will include procedures for monitoring pressure during start-up, transfer and shutdown, and for responding to potential leaks during any part of the IRPL operation; (2) develop a formal training program for all IRPL operators and linewalkers consistent with the foregoing operation and maintenance manual; (3) to ensure reliable leak detection of the IRPL, repair or replace the existing leak detection system; (4) develop measures to reduce the risk of future external damage to the IRPL; (5) pressure test the IRPL consistent with any applicable regulation and governmental requirements. Upon the issuance of a DOT order, these requirements will be superseded by the terms of such order.

VI. MARINE OPERATIONS TRAINING

A. Exxon shall, within one year of the entry of the Consent Order, at its sole expense, provide one-day training sessions concerning its marine operations, including without limitation, lightering and dockside transfer operations, communication system use and marine operation spill prevention, to four groups consisting of twenty-five (25) persons each, to be designated by the Governments. The training shall be at times and places mutually agreed to by Exxon and the Governments.

B. Exxon shall provide one, one-day training session annually for five years, to a group of twenty-five (25) persons to be jointly designated by the Governments in the care and handling of waterfowl and other birds exposed to petroleum spills.

VII. DATA DISCLOSURE

Exxon and the appropriate agencies of the Governments shall exchange scientific data as set forth in Exhibit C with respect to the Spill, to promote scientific study of the environment, subject to any agreement between a party and its consultant regarding the consultant's right of initial publication. The data disclosed shall be made available as soon as practicable. Such data, at the discretion of the producing party, shall not include any material which would disclose opinion work product or communications between the client and counsel or advice of counsel. No data made available by any Government or by Exxon pursuant to this paragraph shall be admissible in evidence against the party making available that data, or otherwise used against the party making available that data, in any lawsuit or other proceeding; however, any Government or Exxon shall not be precluded from using the same data for any purpose if it is obtained through other means, including but not limited to discovery or court order. The data disclosed by Exxon and the Governments pursuant to this paragraph is subject to claims of attorney work product and other privileges. Disclosure of data pursuant to this paragraph by Exxon or the Governments shall not

be deemed a waiver of attorney work product or any other privilege. The Governments and Exxon agree not to assert or otherwise allege in any litigation or proceeding that the Governments or Exxon waived the work product or any other privilege as a result of the disclosure of data pursuant to this paragraph.

VIII. PUBLIC COMMENT

There will be a thirty (30) day public comment period consistent with the procedures set forth in 28 C.F.R. section 50.7, prior to moving the Court to enter this Consent Order.

IX. EFFECTIVENESS OF CONSENT ORDER

If this Consent Order does not become effective for any reason, this Consent Order shall be null and void for all purposes and of no further force and effect, and any and all sums paid by Exxon hereunder shall be refunded to Exxon forthwith together with all interest thereon.

X. RELEASE OF CLAIMS

A. Effective upon entry of this Consent Order, each of the Governments releases Exxon, its present and former officers, directors, trustees, shareholders, agents, representatives, employees, subsidiaries and affiliates, as well as the heirs, executors, administrators, successors and assigns of any of them, from any and all claims by the Governments, whether legal, equitable or statutory, including without limitation any and all claims under the Federal Water Pollution Act, 33 U.S.C. §§1251 et seq.; the New York Navigation Law; the New York City Fire Code,

N.Y.C. Admin. Code; the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.; and the Municipal Code of the City of Elizabeth; and all implementing regulations, and under common law, that arise out of or are based on, or could in the future arise out of or be based on: (i) any of the matters alleged in the Complaints served or filed in this action and each of the state court actions described above; (ii) any matter, except verified outstanding obligations to the Coast Guard to pay for equipment, personnel, and materiel, relating to the Spill; and (iii) any matter relating to the operation of the IRPL, in connection with the Spill, including its leak detection system. As more particularly set forth in Paragraph V.E, this Release of Claims does not limit or waive any right the Governments may have to seek to enjoin operation of the IRPL nor is this Release of Claims a concession by Exxon that the Governments have any jurisdiction over or any right to enjoin the operation of the IRPL.

B. Notwithstanding any other provision of this Consent Order, the release of claims shall not apply to failure by Exxon to satisfy the requirements of this Consent Order.

C. Effective upon entry of this Consent Order, Exxon releases each of the Governments, their agencies, employees and agents from any and all claims by Exxon whether legal, equitable or statutory, including without limitation any and all claims under common law, that arise out of or are based on, or could in

the future arise out of or be based on any matter relating to the Spill.

XI. DISMISSAL OF ACTIONS WITH PREJUDICE

Upon entry of this Consent Order, each of the claims for relief in this action is, and each of the causes of action in each of the state court actions described shall be dismissed with prejudice and without costs or disbursements to any party. The Signatories agree that they will enter into and execute all Stipulations of Dismissal, with prejudice, necessary to implement the resolution of all controversies between them arising out of the Spill.

XII. DISCLAIMER OF LIABILITY

A. Neither entry of this Consent Order nor any action in accordance with this Consent Order shall constitute an admission of liability under any federal, state or local statute, regulation, ordinance, or common law for any fines, penalties, response costs, damages or claims or an admission of any issue of fact or law or of responsibility for the Spill by Exxon, its present or former officers, directors, trustees, shareholders, agents, representatives, employees, subsidiaries or affiliates.

B. The parties further agree that none of the provisions of this Consent Order, nor evidence of any negotiations or proceedings in pursuance thereof, shall be offered or received in evidence in this action or any other action or proceeding by any party for any purpose, except for enforcement of this Consent Order.

XIII. RESERVATION OF RIGHTS

Notwithstanding any other provisions of this Consent Order:

A. This Consent Order is not intended to in any way affect the interpretation or enforcement of, or modify or supersede any existing or future license or consent Exxon may now have or in the future obtain to install or operate the IRPL on lands owned or held in trust for the people by the Governments.

B. The Governments reserve all rights they may have to regulate the IRPL and Exxon's oil transfer operations. This Consent Order shall in no way limit those rights and in no way limits any rights the Governments may have to require or impose conditions upon Exxon's installation or operation of the IRPL on lands owned or held in trust for the people by the Governments.

C. This Consent Order does not constitute a settlement or waiver of any right acquired by subrogation or implied indemnification by any oil spill compensation fund which entitles any such fund to bring an action for reimbursement of claims arising from the Spill which such fund has acquired. Exxon may assert all defenses and remedies available to it, including failure by the Governments to comply with requirements of the applicable statutes and regulations in any forum. The Governments represent that, to their knowledge, after diligent inquiry, no claims arising out of or related to the Spill have been made by any person upon any oil spill compensation fund as of the date of the execution of this Consent Order.

D. Nothing in this Consent Order shall constitute or be construed as a release by Exxon of any claim or cause of action against any person or other entity not a signatory to this Consent Order for any liability it may have arising out of or relating to the Spill.

XIV. RETENTION OF JURISDICTION BY THE COURT

The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate, including any construction of the terms, or implementation or enforcement of this Consent Order.

XV. DELIVERY OF NOTICES/STUDIES/DOCUMENTS

All notices, studies, reports, or other documents required to be delivered to representatives of the Governments or Exxon shall be sent by certified mail, return receipt requested, to the individuals at the addresses set forth below:

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Charles Hoffmann, Assistant Branch Chief
Water, Grants & General Law Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region II
26 Federal Plaza
New York, New York 10007

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:

Marguerite Matera
Office of General Counsel
Northeast Region
National Oceanic and Atmospheric
Administration
One Blackburn Drive
Gloucester, Massachusetts 01930

FOR THE DEPARTMENT OF THE INTERIOR:

Mark Barash
Office of Regional Solicitor
Department of Interior
Suite 612
One Gateway Center
Newton Corner, Mass 02158

FOR THE STATE OF NEW YORK:

Gordon J. Johnson
Deputy Bureau Chief
New York State Dept of Law
Environmental Protection Bureau
120 Broadway
New York, New York 10271

Carol Ash
Regional Director, Region II
New York State Department of
Environmental Conservation
47-40 Twenty First Street
Long Island City, New York 11101

FOR THE STATE OF NEW JERSEY:

Kenneth W. Elwell
Deputy Attorney General
Division of Law
Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

Wayne Howitz, Chief
Bureau of Compliance and Technical Services
Hazardous Waste Enforcement Element
CN 028
401 East State Street
Fifth Floor
Trenton, N.J 08625-0028

Paul Hauge
New Jersey Department of Environmental Protection
Division of Science and Research
CN 409
401 East State Street
First Floor
Trenton, N.J. 08625-0409

FOR THE CITY OF NEW YORK:

Nancy Lewson, General Counsel
New York City Department of
Environmental Protection
One Center Street
New York, New York 10007

Marc Matsil, Director
Natural Resource Group
Department of Parks and Recreation
The Arsenal North
1234 Fifth Avenue
New York, New York 10029

Peter H. Lehner, Director
Environmental Prosecution Unit
New York City Law Department
100 Church Street
New York, New York 10007

FOR THE CITY OF ELIZABETH:

John N. Surmay, Director
Health, Welfare & Housing
City of Elizabeth
50 Winfield Scott Plaza
Elizabeth, New Jersey 07201-2462

FOR EXXON CORPORATION:

Donald D. Esch
c/o Exxon Company, U.S.A.
1400 Park Avenue
Linden, New Jersey 07036

XVI. COMPLIANCE WITH LAWS AND REGULATIONS

The Consent Order shall not be construed in any way to relieve Exxon from the obligation to comply with any applicable federal, state, or local law or regulation.

XVII. REPRESENTATIVES

Each undersigned representative of the parties to this Consent Order certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind such party to this document.

XVIII. COUNTERPARTS

This Consent Order may be executed in any number of counterparts and each executed counterpart shall have the same force and effect as an original instrument.

XIX. HEADINGS

The headings in this Consent Order are inserted for convenience only and are not intended to be a part of or to affect the meaning or interpretation of the Consent Order.

SO ORDERED THIS 14th day of June 1991.

United States District Judge
Eastern District of New York

[First signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE UNITED STATES OF AMERICA

DATE: 3/15/91

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

Richard H. Boote
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

Andrew Maloney
United States Attorney
Eastern District of New York

BY:
Robin Greenwald
Assistant U.S. Attorney
Eastern District of New York

[Second signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: 9/15

Raymond B. Ludwiszewski
Acting Assistant Administrator for
Enforcement
U.S. Environmental Protection Agency
Washington, D.C.

[Third signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: 3/10/91

Constantine Sidamon-Eristoff
Regional Administrator
U.S. Environmental Protection Agency,
Region II

[Fourth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

DATE: 3/15/91

Thomas A. Campbell
General Counsel
National Oceanic and Atmospheric Administration

Marguerite Matera /MTB
Marguerite Matera
Office of General Counsel
Northeast Region
National Oceanic and Atmospheric Administration

[Fifth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE DEPARTMENT OF THE INTERIOR

DATE: 2-5-91

Anthony R. Conte
Regional Solicitor, Northeast Region
Department of the Interior

[Sixth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General

DATE: 3/19/91

BY: _____
Gordon J. Johnson (GJ7379)
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law

_____
Nancy Stearns (NS0960)
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law

_____
Carol Ash
Regional Director, Region II
New York State Department of
Environmental Conservation

[Seventh signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE STATE OF NEW JERSEY

ROBERT J. DEL TUFO
Attorney General of New Jersey
Through
STEVEN J. MADONNA
State Environmental Prosecutor

DATE: 3/18/91

Kenneth W. Elwell
Deputy Attorney General
and Assistant State
Environmental Prosecutor

Donna D'Anna
Deputy Attorney General
and Assistant State
Environmental Prosecutor

Martin J. McHugh
Deputy Attorney General
and Assistant State
Environmental Prosecutor

[Eighth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE CITY OF NEW YORK

DATE: Nov. 19, 1991

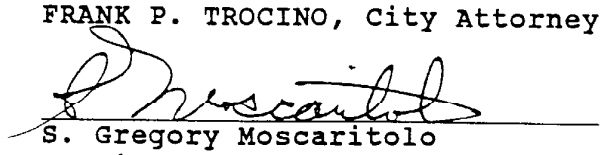
Victor A. Kovner
Corporation Counsel

Peter H. Lehner
Susan E. Amron
Assistant Corporation Counsels
Environmental Prosecution Unit

[Ninth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR THE CITY OF ELIZABETH

FRANK P. TROCINO, City Attorney

DATE: 3/19/91 BY: 

S. Gregory Moscaritolo
Special Counsel

[Tenth signature page of ten signature pages of Consent Order with Exxon Corporation in United States, et al., v. Exxon Corporation (E.D.N.Y.)]

FOR EXXON CORPORATION

DATE: 3/8/91

Joe T. McMillan
Executive Vice President
Exxon Company, U.S.A.
A Division of Exxon Corporation

EXHIBIT A

EXHIBIT A

Specific Action Steps

The following specific action steps, among others, have been or are being undertaken by Exxon based on the recommendations of Exxon's Marine Operations Study. Exxon retains the right to modify any of these steps based on such additional recommendations as may be made pursuant to further evaluation by Exxon of its marine operations.

Bayway Facilities

1. Inspect, repair and upgrade of loading arms. Inspection of Couplers at Steamer Dock 2 and replacement of couplers at Steamer Dock 1.

2. Improvement of instrumentation to reduce risk of barge overfill, including provision of "loading alert button" for bargeman, and of additional emergency stops for dock personnel.

3. Improvement of ship to shore communication ability, with installation of new equipment.

4. Improvement of fendering at #1 dock.

5. Improvement of sump operation at barge and steamer docks, including replacement of piping and the installation of a high level alarm.

6. Upgrading of hose operations, including replacement of all hoses to meet maximum 5-year life requirement for hose tower, and recommissioning of hose tower.

7. Engineering review and upgrading of hoses, including provisions for interim use of "special" approved asphalt hose, with planned installation of metal loading arms for asphalt service.

8. Improvement of dock lighting.

9. Testing and repair of equipment to ensure that dock facilities are in good operating order.

10. Implementation of barge berthing restrictions to reduce the possibility of barge collisions.

11. Verifying that barges have tested within past 30 days the emergency stops system for cargo discharge.

12. Pre-booming for vessels transferring cargo with flash point of greater than 100° F.

13. Provision of additional walkway grating to improve personnel access to the docks.

14. Increasing mooring safety at Steamer Docks for winchless vessels.

Bayway Procedures

1. Modification of coupling procedures and increasing training in those procedures.

2. Establishment of hands-on dock specific fire training for dock personnel and shift mechanics.

3. Enhancement of pre-arrival terminal/ship information exchange, including expansion of existing procedures.

4. Implementation of new procedure to disallow barges from tying up at pier knuckles.

5. Modification of barge topping off procedure.

6. Continuing enhancement of new procedures for loading of static accumulators.

7. Institution of additional safeguards, including coverage and predocking inspection for third-party tankers by Pollution and Safety Control Representatives ("PSCR's"), and having equipment and personnel on "ready standby" in case of a spill.

8. Institution of barge pre-transfer inspection and hose certification procedures with 3-year maximum hose life requirement.

9. Institution of additional training for personnel.

10. Implementation of operating guidelines to ensure safer vessel mooring.

11. Institution of procedure for barge hull inspection for obvious holes or damage in vessel hulls during the docking operation.

12. Reduction of risk of barge overfills by limiting filling height to one foot below the deck (to be discontinued for a barge upon installation of high level alarms and spill rails).

Bayonne Facilities

1. Improvement of instrumentation to reduce risk of barge overfill (e.g., provision of "loading alert button" for bargeman, and provision of an additional emergency stop button).

2. Improvement of ship to shore communication ability, with installation of new equipment.

3. Improvement of fendering at Pier No. 7.

4. Improvement of sump operation at the active piers, including installation of high level alarms on all non-gravity sumps.

5. Upgrading of hose operations, including replacement of all hoses to meet maximum 5-year life requirement for hose tower, and recommissioning of hose tower.

6. Engineering review and upgrading of hoses, including provisions for interim use of "special" approved asphalt hose, with planned installation of metal loading arms for asphalt service.

7. Testing and repair of equipment to ensure that dock facilities are in good operating order.

8. Pre-booming for vessels transferring all cargo with flash point of greater than 100° F.

9. Structural improvements to marine pier 6.

Bayonne Procedures

1. Establishment of hands-on dock specific fire training for dock personnel.

2. Enhancement of pre-arrival terminal/ship information exchange, including expansion of existing procedures.

3. Reinforce use of pier logs to enhance shift change information flow.

4. Modification of barge topping off procedures.

5. Institution of additional safeguards, including PSCR coverage and predocking inspection for third-party tankers, and having equipment and personnel on "ready standby" in case of a spill.

6. Institution of barge pretransfer inspection and hose certification procedures with 3-year maximum hose life requirement for barges and ships.

7. Institution of additional training for personnel.

8. Continuing enhancement of procedures for loading of static accumulators.

9. Implementation of operating guidelines to ensure safer vessel mooring.

10. Institution of procedure for barge hull inspection for obvious holes or damage in vessel hulls during the docking operation.

11. Reduction of risk of barge overfills by limiting filling height to one foot below the deck (to be discontinued upon installation of high level alarms and spill rails on Exxon-owned barges).

12. Institution of small craft fueling procedures to protect against tank over flows during loading operations.

Exxon Shipping Co./
Exxon Co. International ("ECI")

1. Institution of procedures to increase quality of tugs, barges and ships using Exxon facilities.

2. Upgrading of tugs and barges, including eventual installation of high level alarms and spill rails on all Exxon-owned barges, and the employment in NY/NJ Harbor of the tug "Empire State," on which fire fighting and spill control equipment has been installed.

3. Improvement of Harbor Pilot Service by screening and approving a select high caliber group.